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No. 90-929

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

STANLEY J. MARSHALL, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT*

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether, in determining the weight of lysergic acid diethylamide (LSD) for sentencing purposes, the court correctly considered the combined weight of the LSD and the blotter paper used as a carrier medium for the drug.

2. Whether considering the combined weight of LSD and the blotter paper used as a carrier medium for the drug for sentencing purposes violates the Due Process Clause of the Fifth Amendment or the Cruel and Unusual Punishment Clause of the Eighth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A48) is reported at 908 F.2d 1312. The opinion of the district court is reported at 706 F. Supp. 650.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 1990. A petition for rehearing was denied on September 10, 1990 (Pet. App. A49-A50). The petition for a writ of certiorari was filed on December 10, 1990 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a bench trial in the United States District Court for the Central District of Illinois, petitioner was convicted of distributing ten or more grams of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD), in violation of 21 U.S.C. 841(a)(1), and of conspiring to commit that offense, in violation of 21 U.S.C. 846. Petitioner was sentenced to a term of 240 months' imprisonment. The en banc court of appeals affirmed. Pet. App. A1-A48.

1. Working from his headquarters in California, petitioner supplied large quantities of LSD to retail distributors operating in Springfield, Illinois. Law enforcement officers seized from those distributors LSD-impregnated blotter paper provided by petitioner that contained a total of 11,751 "hits" of LSD. The weight of the LSD-imbedded paper totalled 113.32 grams; the weight of pure LSD from which the paper was prepared was 670.72 milligrams. 706 F. Supp. 650, 651 (C.D. Ill. 1989); Gov't C.A. Br. Attachment 3.

2. In accordance with 21 U.S.C. 841(b)(1)(A)(v) and (B)(v) and the directive in United States Sentencing Comm'n, *Guidelines Manual* § 2D1.1 Drug Quantity Table n.* (1987), that the entire amount of the mixture or substance that contains any detectable amount of a controlled substance shall be considered in measuring the quantity of the drug involved, the district court calculated the sentencing range for petitioner's offense in light of the 113-gram combined weight of the LSD and the medium paper. Because more than 100 grams, but less than 300 grams of LSD was involved, petitioner's Sentencing Guidelines base offense level was 36. The district court adjusted the offense level upward by two points, finding that petitioner occupied a managerial or supervisory role within the meaning of Sentencing Guidelines § 3B1.1(c). The court also determined that

petitioner's criminal history placed him in category I. Gov't C.A. Br. 6. As thus calculated, the Sentencing Guidelines indicated a range of 235-293 months' imprisonment.¹ The court imposed a sentence of 240 months' imprisonment. Had the weight of the pure LSD alone been considered, petitioner would not have been liable to a mandatory minimum sentence and his base offense level under the Sentencing Guidelines would have been 14 levels lower.

3. A divided court of appeals, sitting en banc, affirmed petitioner's sentence. Pet. App. A1-A25. The en banc majority held that LSD carrier mediums, including blotter paper, constitute "mixture[s] or substance[s] containing a detectable amount," 21 U.S.C. 841(a)(1)(A)(v) and (B)(v), of the drug and therefore must be included in calculating the drug's weight. *Id.* at A7, A8. The en banc majority also held that this sentencing scheme, which makes the sentence increase with the drug's quantity, was rational and constitutional. *Id.* at A17. Five judges dissented. *Id.* at A25-A48. They concluded that the weight of LSD carrier mediums, such as blotter paper, should be not be considered when determining the weight of LSD for sentencing purposes, and that counting the weight of such carrier mediums is irrational.

ARGUMENT

Petitioner contends that the district court erred in calculating the sentencing range for his conduct based upon the combined weight of the LSD and the blotter paper used as a carrier medium. In petitioner's view, the ruling below is contrary to the intended meaning of the statute, Pet.

¹ Because ten or more grams of LSD was involved, 21 U.S.C. 841(b)(1)(A)(v) also required the imposition of a mandatory minimum penalty of ten years' imprisonment.

12-23, and would be unconstitutional even if it were intended, Pet. 23-60.

The question whether the combined weight of LSD and the carrier medium may be considered in determining the weight of LSD for sentencing purposes under the federal drug statutes, the Sentencing Guidelines, and the Constitution is currently pending before this Court in *Chapman v. United States*, cert. granted, No. 90-5744 (Dec. 10, 1990). In fact, petitioner's case was consolidated with the cases of the petitioners in *Chapman* for resolution by the en banc Seventh Circuit. Accordingly, the petition should be held pending this Court's resolution of *Chapman* and should then be disposed of accordingly.

CONCLUSION

The petition for a writ of certiorari should be held pending the decision in *Chapman v. United States*, cert. granted, No. 90-5744 (Dec. 10, 1990), and should then be disposed of as appropriate in light of that decision.

Respectfully submitted.

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JANUARY 1991